No. 91-615

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ALLIED-SIGNAL INC.
as successor-in-interest to
The Bendix Corporation,
Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

SUPPLEMENTAL BRIEF OF THE COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation as *amicus curiae* in support of the petitioner in the above captioned matter and will address the first question presented in this Court's order of March 11, 1992, that is, whether this Court should overrule *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307 (1982) and *F.W. Woolworth Co. v. Taxation & Rev-*

enue Department of the State of New Mexico, 458 U.S. 354 (1982). Written consents of the petitioner and respondent have been obtained and filed with the Clerk of Court.

INTEREST OF *AMICUS CURIAE*

At issue in this case is the continued viability of the unitary concept and the protections given by the Due Process and Commerce Clause to multistate corporate taxpayers from the overreaching by jurisdictions in which they conduct business. Therefore, the Committee on State Taxation, an organization with a membership of 364 major multistate corporations, has a great interest in the issues currently being considered by this Court.

The Committee on State Taxation ("COST") is a nonprofit association originally organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. Its purpose is to promote the adoption of state tax systems which will enhance the ability of business to effectively compete in the marketplace free from inequitable, discriminatory and unconstitutional practices which may place corporate taxpayers at a competitive disadvantage. COST's member companies conduct a substantial portion of the interstate commerce of United States taxpayers and are representative of that part of the nation's business sector which is directly affected by state taxation of interstate operations.

COST's objectives include the promotion of proper methods of assigning values, income and taxable incidents among the various states. In working towards this objective, COST and its member companies have relied on the unitary principles as set forth by this Court in a long line of decisions and reinforced in *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307 (1982) and *F.W. Woolworth Co. v. Taxation & Revenue Department of the State of New Mexico*, 458 U.S. 354 (1982). If these decisions are overruled, the due process and com-

merce clause restraints which are the basis for the unitary principle will be destroyed. Therefore, COST clearly has a vital interest in this case.

SUMMARY OF ARGUMENT

This Court has stated that the "doctrine of stare decisis is of fundamental importance to the rule of law." *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 494 (1987). Therefore, "overruling a precedent of this Court is a matter of no small import" *Payne v. Tennessee*, 111 S.Ct. 2597, 2617 (1991) (Souter, concurring), and "[a]ny departure from the doctrine of stare decisis demands special justification", *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), particularly where an established constitutional principle is concerned. *Smith v. Allwright*, 321 U.S. 649, 666 (1944).

In those anomalous situations in which this Court has deviated from the doctrine of stare decisis, special justification for the propriety of such action has been established. Special justification has been evidenced where there has been an intervening development in the law, *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989); where there is a need for coherence or consistency, *Patterson*, *supra* at 173; where the old rule is unworkable, *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965), or where the constitutional rule had absolutely no basis in constitutional text, historical practice, or in logic. *Payne*, *supra*, at 2613 (Scalia, concurring). None of these criteria is present in the instant case.

This Court's decisions in *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307 (1982) and *F.W. Woolworth Co. v. Taxation & Revenue Department of the State of New Mexico*, 458 U.S. 354 (1982) are the outgrowth of a long line of due process and commerce clause jurisprudence dating from the late 1800's, *see*, *State R.R. Tax Cases*, 92 U.S. 575 (1875), and most recently repeated in *Container Corporation of America v. Franchise*

Tax Board, 463 U.S. 159 (1983). These cases present a correct and coherent interpretation and application of the limitations placed on the state's taxing power by the Due Process and Commerce Clauses. These clauses of the Constitution "do not allow a State to tax income arising out of interstate activities—even on a proportional basis—unless there is a minimal connection or nexus between the interstate activities and the taxing State . . . [cites omitted]." *Container, supra*, at 165.

This long line of cases has been relied upon by both the states and taxpayers, and while the two groups may disagree on the application of the unitary principles to a particular fact situation, all are in full understanding of the basic legal concepts as they have been established by this Court in the last one hundred years.

The only "special justification" offered by the State of New Jersey for departing from the doctrine of stare decisis and the overruling of these long standing principles is that the result is "grossly unfair" because it prevents the State from "getting a fair crack at large amounts of investment income". Tr. of Oral Argument at 40. Certainly, one hundred years of case law should not be precipitously overruled because it would allow one state, in one case, to impose a larger tax.

ASARCO and *Woolworth* were not decided in a vacuum and cannot be overruled in a vacuum. They cannot be overruled without also overruling this Court's decisions which led up to and followed them. They cannot be overruled without rendering the unitary concept meaningless. They cannot be overruled without injurious and unexpected results. Therefore, COST strongly urges this Court to reaffirm its decisions in *ASARCO* and *Woolworth* and, for the reasons set forth in its original brief, asks this Court to reverse the decision of the New Jersey Supreme Court.

ARGUMENT

I. UNDER THE DOCTRINE OF STARE DECISIS, *ASARCO* AND *WOOLWORTH* SHOULD NOT BE OVERRULED

As this Court recognized in *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) "[t]his Court has said often and with great emphasis that 'the doctrine of stare decisis is of fundamental importance to the rule of law.' *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 494 (1987)." "Stare decisis is the preferred course because it promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 111 S.Ct. 2597, 2609 (1991). Thus, "overruling a precedent of this Court is a matter of no small import", *Payne*, *supra* at 2617 (Souter, concurring), and "the necessity and propriety of doing so" must be established. *Patterson*, *supra* at 172. "Any departure from the doctrine of stare decisis demands special justification", *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), particularly where an established constitutional principle is concerned. *Smith v. Allwright*, 321 U.S. 649, 666 (1944).

In determining whether "special justification" for overruling a particular case exists, this Court has relied on several factors. Thus, this Court has overruled precedent where there has been an intervening development in the law, *Patterson*, *supra* at 172, or where the constitutional rule set forth in the case has "absolutely no basis in constitutional text, in historical practice, or in logic." *Payne*, *supra* at 2613 (Scalia, concurring). Additionally, this Court has departed from precedent it found erroneous where that precedent is unworkable. *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965), or where the prior case causes confusion and is a detriment to coherence and consistency, *Patterson*, *supra* at 173, and "[f]inally,

it has sometimes been said that a precedent becomes more vulnerable as it becomes outdated. . . ." *Patterson, supra* at 174. As will be discussed below, none of these factors is present in this case. Therefore, there is no justification for departing from stare decisis and the holdings in *ASARSO* and *Woolworth* should be acknowledged as governing the state taxation of intangible investment income earned by multistate corporations.

II. *ASARCO* AND *WOOLWORTH* CANNOT BE OVERRULED WITHOUT DESTROYING LONG-STANDING CONSTITUTIONAL PRINCIPLES

It has long been recognized that a state tax will not withstand Due Process and Commerce Clause scrutiny unless there is a sufficient nexus between the taxing state and the activities sought to be taxed. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 452 (1959). *See also, Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445 (1940). There must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. v. Maryland*, 347 U.S. 340, 344-345 (1954). It is this due process and commerce clause requirement of nexus that is at the heart of the instant case.

Separate geographical accounting comports with this constitutional requirement, but separate accounting has generally been rejected by the states on the ground that it "often ignores or captures inadequately the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise." *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 164-165 (1983). Therefore, the unitary concept was developed as a means of determining the instate value of a multistate entity that is inherently indivisible. Recognizing the "impossibility of allocating specifically the profits earned by the processes conducted within [a state's] borders", *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920), this Court has held that

a state is "justified in attributing . . . a just proportion of the profits earned by the Company from [a] unitary business." *Bass, Ratcliff & Gretton, Limited v. State Tax Commission*, 266 U.S. 271, 282 (1924). The decisions of this Court make clear that it is the existence of a unitary entity that creates a sufficient link with the state for due process and commerce clause purposes. *See, Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 439 (1980); *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207, 223 (1980). It is only after this unitary entity is established that formulary apportionment is appropriate to determine "a rough approximation of the income properly attributable to the taxing state." *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 271 (1978).

The "unit" rule was first developed and applied one hundred years ago in the area of property taxation and used to value property located in more than one jurisdiction. *See, e.g., State R.R. Cases*, 92 U.S. 575 (1875); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). As this Court explained in discussing *Pullman's Palace* in *Adams Express Company v. Ohio State Auditor*, 165 U.S. 194, 221 (1896), "the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a urit value, a proportionate part of which value might be reached by the state authorities on the basis indicated." The Court noted that the purpose of the "unit rule" is not to "attempt to tax property having a situs outside of the State, but only to place a just value on that within." *Adams Express Company, supra* at 227. Thus,

> [t]he only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess . . . Therefore no property of such an interstate road

> situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State.

Wallace v. Hines, 253 U.S. 66, 69 (1920).

This unit rule was later extended to state income taxation. In *Underwood Typewriter, supra* at 120-121, this Court held that the use of an apportionment formula which included all of a company's income in the tax base met the constitutional nexus requirement because

> [t]he profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. . . [The legislature] adopted a method of apportionment which, for all that appears in the record, reached, and was meant to reach, only the profits earned within the State.

Similarly, this Court held that "the State was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business" in *Bass, Ratcliff & Gretton, Limited v. State Tax Commission*, 266 U.S. 271, 282 (1924). In *Bass*, this Court found that "the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions beginning with the manufacture in England and ending in sales in New York and other places—the process of manufacturing resulting in no profits until it ends in sales." *Id.*

This Court has applied the unitary concept throughout this century in a long line of cases. *Container, supra* at 163-165 and cases cited therein. The basic principle underlying all of these cases is that "the linchpin of apportionability in the field of state income taxation is the unitary-business principle." *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 439 (1980).

In applying the unitary business principle to state income taxation, the Court has always recognized, as it

emphasized in *Adams*, that unity requires "a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business." 165 U.S. at 222. This Court has always required that there be unity of ownership, use and management, that is, a functional integration of the businesses sought to be included in the unitary business. *Butler Brothers v. McColgan*, 315 U.S. 501, 508 (1942). Most recently, in *Container*, *supra*, the Court stated that the

> prerequisite to a constitutionally acceptable finding of unitary business is a flow of *value* . . . As we reiterated in *F.W. Woolworth*, a relevant question in the unitary business inquiry is whether " 'contributions to income [of the subsidiaries] result[ed] from functional integration, centralization of management, and economies of scale.' " 458 U.S. at 364, 102 S.Ct., at 3135, quoting *Mobil*, 445 U.S., at 438, 100 S.Ct., at 1232.

463 U.S. at 178-179 (emphasis and brackets in original).

Thus, in *Mobil* this Court found that the dividend income arose from a unitary business because the taxpayer "made no effort to demonstrate that the foreign operations of its subsidiaries and affiliates are distinct in any business or economic sense from its petroleum sales activities in Vermont" so that the State "was entitled to conclude that the dividend income's foreign source did not destroy the requisite nexus with in-state activities." 445 U.S. 441, 439-440. Nevertheless, this Court, prior to its decisions in *ASARCO* and *Woolworth*, recognized in *Mobil* that

> [w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business.

Mobil, *supra* at 442.

Mobil makes clear that income which is earned in the course of activities that are unrelated to the operating business activities within a state may not be taxed by the state because there is no unitary business. *Mobil, supra* at 439. If the income is derived from an " 'unrelated business activity' which constitutes a 'discrete business enterprise,' ", *Exxon, supra* at 224, quoting *Mobil*, it is not part of a unitary business having nexus with a state and cannot be subject to apportionment. Rather, intangible income must be "derived from a functionally integrated enterprise", *Mobil, supra* at 440, before a state may constitutionally impose its tax on that income.

Moreover, after its decisions in *Mobil, ASARCO* and *Woolworth*, this Court, consistent with those cases, stated that in order to have constitutional nexus,

> the out-of-state activities of the purported "unitary business" be related *in some concrete way* to the in-state activities. The functional meaning of this requirement is that there be some sharing or exchange of value not capable of precise identification or measurement-*beyond the mere flow of funds arising out of a passive investment or a distinct business operation*—which renders formula apportionment a reasonable method of taxation.

Container, supra at 166 (emphasis added). This Court further recognized in *Container* that it was "made clear in *F.W. Woolworth Co.* that a unitary finding could not be based merely on 'the type of occasional oversight—with respect to capital structure, major debt, and dividends—that any parent gives to an investment . . .' 458 U.S., at 369." 463 U.S. at 180, fn. 19.

Thus, *ASARCO* and *Woolworth* did not enunciate some principle pulled from thin air for use only in those cases. Rather, those cases involved the application of constitutional nexus requirements that have been developed by

this Court in over one-hundred years of case law. *ASARCO* and *Woolworth* are part of a whole cloth woven by the long line of cases enunciating the unitary principles. *ASARCO* and *Woolworth* cannot be overruled without causing this cloth to unravel. As noted in *ASARCO*, the general principle that a State may not tax value earned outside its borders dates to the early years of state income taxation and the application of this general principle in this case is guided by this Court's decisions in *Mobil* and *Exxon*. *ASARCO*, *supra* at 315. That *ASARCO* and *Woolworth* are integral threads in the unitary cloth is further evidenced by this Court's reliance on those cases in *Container*, its most recent decision applying the unitary principles.

Clearly, the constitutional principles enunciated in *ASARCO* and *Woolworth* have long been found to be constitutionally mandated, as well as having a basis in logic and historical practice. The unitary concept has not become outdated over time or through intervening developments in the law, but has continued to be strengthened in a logical and coherent fashion. *ASARCO* and *Woolworth* cannot be overruled without doing serious damage, if not destroying, the entire unitary principle developed by this Court over the last one hundred years. They cannot be overruled without also overruling *Mobil*, or, at the very least, calling into question every other unitary decision of this Court and destroying the constitutional underpinnings of multistate taxation. Such action would have unforeseen and unexpected implications for both states and taxpayers. There is no justification for this Court taking such a dangerous and precipitous course.

While the "legal principles defining the constitutional limits on the unitary business principle are now well estabilshed" it is not disputed that in determining whether related corporate subsidiaries are unitary can be difficult and time consuming in that "the factual records in [unitary] cases . . . are long and complex . . .". *Container*,

supra at 176. Whether functional integration exists between related corporations is a fact sensitive issue. While both taxpayers and states may prefer a brightline test[1] for administrative ease, this easy course is not available, as the decisions of this Court have consistently held that "apportionment, which takes into account the entire business income of a multistate business in determining the income taxable by a particular state, is *constitutionally permissible only in the case of a unitary business.*" *ASARCO*, *supra* at 329, fn.14 (emphasis added). One hundred years of constitutional jurisprudence cannot be renounced on the basis that the constitution is not administratively convenient.

New Jersey's alternative, that the unitary concept be abandoned, Tr. of Oral Argument at 35-40, cannot stand because it does not comport with the nexus requirements of the Due Process and Commerce Clauses, however administratively convenient such an option may be. However, with regard to the taxation of intangible income received from investments in unrelated corporations, *Mobil*, *ASARCO* and *Woolworth* do provide a brightline test, that even the State of New Jersey admits is "workable". Tr. of Oral Argument at 40.

Nevertheless, the State of New Jersey wishes to discard this workable, brightline rule in favor of a chaotic world with no rules at all. The State acknowledged that its proposal of including all income received in apportionable income will result in problems that "should be dealt with through the apportionment formula." Tr. of Oral Argument at 48. The State has rejected factor representation as a solution, and failed to offer any means to prevent the taxation of income earned outside the State. Tr. of Oral Argument at 48. Additionally, the potential for unconstitutional multiple taxation is readily apparent, as a state would be free to require domiciliary corpora-

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[1] Or, in New Jersey's case, that "no inquiry . . . be made at all." Tr. of Oral Argument at 32.

tions to allocate one-hundred percent of its investment income to it, while other states would require, in addition, that part of the income be apportioned to them. Clearly, the adoption of New Jersey's approach would simply lead to years of litigation by taxpayers over the proper means of adjusting the apportionment formula to prevent unconstitutional taxation. This is not a consistent, workable test or justification for the overruling of *ASARCO* and *Woolworth*. The State has not proven that the doctrine of stare decisis should not be adhered to in the instant case.

New Jersey would have the settled rules of multistate taxation abandoned in favor of a world with no rules and no standards. New Jersey is asking that one-hundred years of Supreme Court case law be abandoned simply so that it can get a "crack at large amounts of investment income", Tr. of Oral Argument at 40, which are clearly unrelated to a taxpayer's business activities within the State and increase its tax coffers at the expense of nondomiciliary corporations.

New Jersey has failed to offer any justification, much less a *special* justification for the overruling of *ASARCO* and *Woolworth*. It offers no constitutional or logical basis for the abandonment of the unitary principle, only that to do so would allow it to collect tax dollars from passive investment income having no connection with a corporation's business activities within its borders. Therefore, under the principles of stare decisis, this Court should refuse to overrule its decisions in these cases.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in its original brief, the Committee on State Taxation respectfully requests that the decisions in *ASARCO* and *Woolworth* be affirmed and the decision of the New Jersey Supreme Court be reversed.

Respectfully submitted,

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